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No. 81-2381

In the Supreme Court of the United States

OCTOBER TERM, 1982

TODD SHIPYARDS CORPORATION, ET AL., PETITIONERS

v.

NORMAN C. ALLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of the statute of limitations of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 913(a), respondent Allan sustained an "injury" at the time his medical condition was correctly diagnosed and he therefore became aware of the full extent, and compensable nature, of the harm to him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 666 F.2d 399. An earlier opinion of the court of appeals (Pet. App. F) dismissing a petition for review of the Benefits Review Board's initial decision for lack of a final order is not reported. The decisions of the Benefits Review Board (Pet. App. E1-E9, I1-I15, K1-K8) are reported at 2 Ben. Rev. Bd. Serv. (MB) 351, 8 Ben. Rev. Bd. Serv. (MB) 570, and 12 Ben. Rev. Bd. Serv. (MB) 589 respectively. The decisions of the administrative law judges (Pet. App. C1-C34, G1-G18, H1-H5, J1-J6) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1982. A petition for rehearing was denied on March 25, 1982 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on June 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 9, 1971, respondent Norman Allan, a shipwright for petitioner Todd Shipyards Corp. (Todd), was injured during the course of his employment when a 10-pound piece of metal fell on his neck and shoulder (Pet. App. A2, C6, E2). Allan experienced pain and dizziness from the blow but, after receiving some aspirin from Todd's first aid facilities, continued to work the rest of the day (*ibid.*). On the following day, Allan was referred by Todd to Dr. Irving Tobin, an orthopedist (*id.* at A3, C7, E2). Dr. Tobin diagnosed Allan's condition as "post occipital headache" and "cervical myosis" (*ibid.*). Dr. Tobin informed Allan that his X-rays were normal and told him that he had a bad bruise, "which would go away in time" (*id.* at A3, C7, E3). Dr. Tobin gave Allan a prescription for pain medication and released him for work (*ibid.*).

Allan returned to work, but his headaches and pain persisted (Pet. App. A3, C8, E3). Allan visited Dr. Tobin again in July 1973, and the doctor again told him that he had nothing more than a bad bruise (*ibid.*). Allan visited Dr. Tobin for a third time in November 1973, and additional X-rays revealed a change in appearance between the fifth and sixth vertebrae (*ibid.*). Dr. Tobin diagnosed the condition as a degenerative disc, which he told Allan

might be a result of the December 1971 accident (*id.* at C8-C9). Dr. Tobin referred Allan to a neurosurgeon, who diagnosed Allan's condition as progressive spondylosis initiated by the earlier accident (*id.* at A4, C9, E3). In January 1974, Allan underwent surgery for an anterior disc removal and fusion (*id.* at A4, C10-C11, E3-E4). On March 17, 1974, Allan returned to work (*id.* at A4, C11). Allan filed a claim for disability compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, on April 5, 1974 (Pet. App. A4, C12, E4).

2. After a hearing, an administrative law judge, applying the version of the Act's one-year statute of limitations that existed before the 1972 amendments to the LHWCA, ruled that Allan's claim was time-barred (Pet. App. C33).[1] Because Allan at all times associated his pain with his earlier accident, the administrative law judge concluded that Allan was aware of his injury from the outset and therefore, for purposes of this case, " 'injury' means the date of accident" (*id.* at C30-31). The administrative law judge expressly rejected Allan's claim that his "injury," within the meaning of Section 13(a) of the Act, 33 U.S.C. 913(a), occurred when he first be-

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[1] Prior to 1972, the Act's statute of limitations, 33 U.S.C. (1970 ed.) 913(a), provided in pertinent part: "The right to compensation for disability under the Act shall be barred unless a claim therefor is filed within one year after the injury * * *." The amended statute retained this provision, but added that "[t]he time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." 33 U.S.C. 913(a).

came aware that his accident could result in some disability (Pet. App. C16).

Applying the amended statute of limitations, the Benefits Review Board reversed. The Board ruled that, under a proper reading of the statute, the "injury" did not occur until Allan could reasonably have been expected to know that he had suffered a *compensable* injury that could be expected to reduce his earning power, and this did not occur until his condition was correctly diagnosed (Pet. App. E5-E6). Until that time, the Board concluded, Allan's injury was "latent or unknown," and therefore the statute was not running (*id.* at E7). The Board explained (*id.* at E6-E7): "To hold otherwise would lead to harsh and incongruous results in those cases where the true nature and seriousness of an injury is not evident to either the claimant or his doctor during the claims period." The Board then remanded the case to the administrative law judge for further action (*id.* at E9).

After another appeal to the Board and remand on the issue of the degree of loss of wage-earning capacity (see generally Pet. App. K2-K4), the Board affirmed a compensation award to Allan (*id.* at K1-K8). The court of appeals affirmed (*id.* at A1-A13). The court agreed with the Board that, under the amended statute of limitations, the touchstone for determining when the injury occurred was when the employee knew, or had reason to know, "that there was an injury in the sense contemplated by § 13(a)—an impairment of earning power" (*id.* at A8). Because the earliest date that Allan acquired such knowledge was November 1973, when X-rays showed a change in his vertebrae, the court held that Allan's April 1974 claim was not time-barred (*ibid.*).

ARGUMENT

1. Petitioners' primary contention (Pet. 7-12) is that the court of appeals erred in holding that the date of respondent Allan's "injury," for purposes of the statute of limitations of Section 13(a) of the Act, 33 U.S.C. 913(a),[2] was the date on which he became aware of the impairment of his earning capacity rather than the date of the accident. This contention is without merit. The court of appeals' decision is correct and does not conflict with a decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

a. In defining "injury" for statute of limitations purposes as the point of awareness of the "full character, extent, and impact of the harm done to [the employee]" (Pet. App. A8, E9), the court of appeals and the Benefits Review Board followed a well established rule of law. In the seminal case of *Stancil* v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970), the court explained the purposes of the Act's limitations period and the congressional intent with respect to the kind of knowledge the employee must have before the limitations period begins to run (*id.* at 277):

> The general theory of the limitations provision is, as we understand it, that the workman should not dawdle too much in filing a claim once he knows (or should know) that there is something wrong with him of a nature which will potentially affect his ability to earn his pre-existing wage (whether or not it has already had that

[2] Petitioner does not argue that the pre-1972 version of Section 913(a) applies here, as the administrative law judge originally held (Pet. App. C13), but rather assumes that the current version applied by the court of appeals is indeed applicable here. In any event, the court of appeals' decision is correct under either version of the statute.

> effect). Conversely, there is no intimation that Congress, contrary to its humanitarian aim, wished to penalize the employee who reasonably does not know that he has suffered harm which will, or may well, reduce his earning capacity.

The *Stancil* court concluded that "once the man has been put on the alert (*i.e.*, once he knows or has reason to know) as to the likely impairment of his earning power, there is an 'injury'; before that time, while there may have been an accident, there is yet no 'injury' for claim or filing purposes under this statute" (*ibid.*). This rule has been followed by several other courts of appeals . See *Bath Iron Works Corp.* v. *Galen*, 605 F.2d 583, 585-586 (1st Cir. 1979); *Newport News Shipbuilding and Dry Dock Co.* v. *Director, Office of Workers' Compensation Programs*, 583 F.2d 1273, 1279-1280 (4th Cir. 1978); *Cooper Stevedoring of Louisiana, Inc.* v. *Washington*, 556 F.2d 268, 275-276 (5th Cir. 1977). See generally 3 A. Larson, *The Law of Workmen's Compensation* § 78-41 (1976).

This remedial reading of the statute of limitations provision, which avoids penalizing an employee who acts according to his reasonable belief that his earning power has not been affected by his accident, is particularly appropriate in the context of the LHWCA, which is to be liberally construed to effect its purpose of compensating injured employees. See, *e.g.*, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). Quite apart from this rule of construction, however, the court of appeals' decision is required by common sense. Otherwise, injured employees would be required to file claims, contrary to their doctors' diagnoses, based on their own conjectures as to the possible scope of their injuries. Most of these claims would not be meritorious, and indeed would not be

thought by the filing employees themselves to be meritorious, and their filing would work a heavy burden on all those involved in the LWHCA compensation process. The court of appeals thus correctly refused to find that Allan's "injury" for purposes of Section 913(a) occurred on the date of his accident simply because he was in continual pain from that time. See *Bath Iron Works Corp.* v. *Galen*, *supra*, 605 F.2d at 586.

Moreover, the 1972 amendment to Section 913(a) manifests Congress' intent that the limitations period not begin to run until an employee knows, or should know, that he has a claim under the statute. Section 913(a) was amended to provide explicitly that the one-year claims period be tolled until the employee is or should be aware of the relationship of his injury to his employment.[3] The decision of the court below, that the time for filing a claim here did not begin to run until respondent Allan had reason to know the extent of the harm caused by the accident and its likely compensable nature, is a necessary complement to this rule.[4]

b. Contrary to petitioners' contention (Pet. 8-9), the rule applied by the court below and by these other

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[3] This provision applies to accidental injuries as well as occupational disease. See *Cooper Stevedoring of Louisiana, Inc.* v. *Washington*, *supra*, 556 F.2d at 274.

[4] The reason for tolling the statute of limitations is not simply because the injury turns out to be more serious than at first thought. Rather, as stated by the court in *Stancil* v. *Massey*, *supra*, 436 F.2d at 279: "We hold for the employee, not because his injury turned out to be a herniated disc rather than a strain, but because all the time it was thought to be a strain the claimant had the best of reasons (the advice of the carrier's doctor) for considering himself not in fact reduced in working power." See also *Newport News Shipbuild-*

circuits does not conflict with this Court's decision in *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952). While petitioner seizes (Pet. 9) upon one sentence in *Pillsbury* that notes the absence of the word "compensable" in the statute, the issue before the Court in *Pillsbury* was different from that involved here. In *Pillsbury*, the Court held that "injury" within the meaning of Section 913(a) was not equivalent to "disability" [5] and therefore that claims filed within one year of the beginning of disability, but more than one year after the accident, were not necessarily timely filed. As the court explained in *Stancil* v. *Massey*, *supra*, 436 F.2d at 279, that decision has little application in this context. Respondent Allan does not claim that the statute of limitations was tolled until he actually became disabled, as did the claimants in *Pillsbury*. Rather, he claims, and the court of appeals agreed, that the time did not begin to run until he had reason to be aware of the extent of his injury—*i.e.*, its likely compensable nature. The *Pillsbury* Court specifically disavowed any intent to address this kind of situation, noting that "[w]e are not here dealing with a latent injury * * *." 342 U.S. at 199. As the court noted in *Stancil* v. *Massey*, *supra*, 436 F.2d at 279, "[t]here was no suggestion [in *Pillsbury*] that the men were unaware, from the beginning, of the full character, extent, and impact of the physical harm done to them." See *United Engineering Co.* v. *Pillsbury*, 92 F. Supp. 898, 900-901 (N.D. Cal. 1950), aff'd, 187

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ing and Dry Dock Co. v. *Director, Office of Workers' Compensation Programs*, *supra*, 583 F.2d at 1280.

[5] The LHWCA defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. 902(10). See also *Stancil* v. *Massey*, *supra*, 436 F.2d at 276 n.4.

F.2d 987, 989 & n.1 (9th Cir. 1951), aff'd, 342 U.S. 197 (1952). This Court's opinion in *Pillsbury*, therefore, does not address the meaning of "injury" for purposes of the statute of limitations, except to hold that the time period can begin to run before the employee is actually disabled.

2. Petitioners also contend (Pet. 12-14) that the Benefits Review Board and the court of appeals failed to apply the "substantial evidence" standard of review. This fact-bound contention is incorrect and does not warrant review by this Court.

a. Petitioners' primary contention (Pet. 13-14) is that the Board and the court of appeals expressly credited respondent Allan's testimony that Dr. Tobin told him he had a bruise that would go away, while the administrative law judge had not done so. In applying the substantial evidence test, however, the Board plainly was entitled to "take into account whatever in the record fairly detracts from [the] weight" of the judge's conclusion that Allan's injury was not "latent" (Pet. App. C13). *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). Here Allan testified without contradiction that Dr. Tobin twice told him that he had a bruise that would go away. Although the administrative law judge ignored this testimony, focusing instead on the fact that at no time did Dr. Tobin ever tell Allan that his pain was not caused by his accident, he did not find Allan's testimony not credible (Pet. App. C9). Allan's testimony is consistent with the fact that Dr. Tobin found his X-rays normal, released him for work, and gave him a prescription for pain and headaches. There was therefore no error in the Board's and the court of appeals' considering that testimony in applying the substantial evidence test.

b. Petitioners claim (Pet. 14) that the Board and the court of appeals erred in rejecting the adminis-

trative law judge's finding that Allan was aware that he suffered a compensable injury from the outset. The Board did not reject any such finding as unsupported by substantial evidence, however, but rather rejected the administrative law judge's decision as based on application of an incorrect legal standard with respect to the meaning of "injury" under Section 913(a) (see Pet. App. E4-E9). Even if the Board's action could be construed as rejection of a factual finding, moreover, the Board's rejection did not violate the substantial evidence rule. Allan continued working at his regular job until he entered the hospital for surgery, he was told repeatedly that his injury was minor and temporary, and his condition was not diagnosed correctly until 19 months after the accident. These factors militate against any finding that Allan should have known that the injury was compensable simply because he was in pain. See *Bath Iron Works Corp.* v. *Galen*, *supra*, 605 F.2d at 585 ("a claimant's awareness that his back hurts is not the same as his awareness that his back is injured within the meaning of the statute").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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